Supreme Court, U.S.
FILED
SEP 29 1995
CLERK

(3)

No. 95-160

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

GOLD COAST PUBLICATIONS, INC. and
NEW TIMES, INC.,
Petitioners,
v.
GEORGE M. CORRIGAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF OF PETITIONERS

SANFORD L. BOHRER
HOLLAND & KNIGHT
701 Brickell Ave.
Miami, FL 33131
(305) 374-8500

DALE COHEN
TRIBUNE COMPANY
435 North Michigan Ave.
Chicago, IL 60611
(312) 222-4123

REX E. LEE *
CARTER G. PHILLIPS
JONATHAN E. NUECHTERLEIN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioners

* Counsel of Record

September 29, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

9 pp

TABLE OF AUTHORITIES

CASES — Page

Board of Trustees v. *Fox*, 492 U.S. 469 (1989) 5
Central Hudson Gas & Elec. Corp. v. *Public Serv. Comm'n*, 447 U.S. 557 (1980) 4
Ladue v. *Gilleo*, 114 S. Ct. 2038 (1994) 3
Members of City Council v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) 6
Metromedia, Inc. v. *San Diego*, 453 U.S. 490 (1981) 6
Miami Herald Publishing Co. v. *Hallandale*, 734 F.2d 666 (11th Cir. 1984) 3
Perry Educ. Ass'n v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) 4, 5
Qualitex Co. v. *Jacobson Prods. Co.*, 115 S. Ct. 1300 (1995) 3
Rubin v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995) .... *passim*
Texas v. *Johnson*, 491 U.S. 397 (1989) 3
Times-Picayune Publishing Co. v. *United States*, 345 U.S. 594 (1953) 2, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-160

GOLD COAST PUBLICATIONS, INC. and
NEW TIMES, INC.,
Petitioners,

v.

GEORGE M. CORRIGAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF OF PETITIONERS

In their petition, petitioners showed that *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995), is incompatible with the reasoning of the opinion below, and that the court of appeals should now have an opportunity to reconsider its decision with *Coors* in mind. Respondents—apart from their patently false contention that the *Coors* decision turned on issues of content neutrality, see Opp. 10—make no serious effort to reconcile *Coors* with the opinion below. Instead, they argue that the *outcome* below was correct for a variety of reasons that the court of appeals itself did not accept. Those arguments, quite apart from their substantive implausibility, are properly addressed to the court of appeals on remand. They are not a basis for denying a remand and forever barring substantive review of petitioners' First Amendment challenge in light of *Coors*.

1. As their primary argument for denying a remand to the court of appeals, respondents contend that this case raises no First Amendment issues of any kind because, in their view, the City's newsrack ordinance "does nothing to restrict petitioners' right to free speech or expression[.]" Opp. 5. That position is substantively untenable and, in any event, presents no basis for denying a remand in light of *Coors*.

First, respondents' position was not the basis for the decision below. Indeed, the court of appeals correctly repudiated that position by acknowledging that a newsrack's appearance is entitled to a measure of First Amendment protection, see Pet. App. 11a, and by subjecting respondents' newsrack ordinance to a comprehensive First Amendment analysis. In short, respondents' position on the First Amendment's applicability to this case is not an argument about the probability that the court of appeals would reconsider its opinion in light of *Coors* —the appropriate standard for determining whether this Court should vacate a decision and remand in light of intervening precedent. Instead, it is an argument, and a flawed one at that, about the ultimate merits of this case. That argument is properly addressed to the court of appeals (which has already rejected it), not to this Court as a means of foreclosing further review.

Second, respondents' position—that the First Amendment has no bearing on newsrack regulations—is substantively wrong. The stylistic form through which publishers present their newspapers to the public is a mode of expression protected by the First Amendment, and respondents cite no case to the contrary. Surely the First Amendment would have some bearing on (for example) a law that required all newspapers to look like the Wall Street Journal or the National Enquirer. See *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 602-03 (1953) (First Amendment protects "dissemination of news from as many different sources, and with as many different facets and colors as is pos-

sible") (internal quotations omitted); see also *Ladue* v. *Gilleo*, 114 S. Ct. 2038, 2046 (1994) (First Amendment protects speaker's right to choose manner of presenting message as well as content of message itself); *Texas* v. *Johnson*, 491 U.S. 397, 404-05 (1989) (surveying wide range of expressive activity entitled to First Amendment protection). Whether or not such a law would ultimately be upheld—and it likely would not—the First Amendment would unquestionably guide the analysis.

Similarly, the First Amendment protects a newspaper publisher's right to advertise its newspapers in a form that appeals to, and is easily recognized by, its distinctive readership. See generally Pet. App. 11a ("[i]t is well settled that the right to distribute newspapers through newsracks is protected under the First Amendment") (citing *Miami Herald Publishing Co.* v. *Hallandale*, 734 F.2d 666, 673-74 (11th Cir. 1984)). As the district court found, see Pet. App. 29a, 51a, the flamboyantly cursive script of the *Exito* logo and the bold colors of the *Exito* newsracks conveyed to potential readers a powerful message about the newspaper's style and content, *cf. Qualitex Co.* v. *Jacobson Prods. Co.*, 115 S. Ct. 1300, 1304-05 (1995), a message that Coral Gables' newsrack ordinance suppresses altogether. As the court of appeals recognized, the validity of that ordinance is properly viewed through the prism of the First Amendment.

At bottom, respondents appear to contend that a city may insulate restrictions on journalistic expression from First Amendment scrutiny simply by characterizing them as "content neutral." See Opp. 6 (confounding issue of whether speech restriction is "content-based" with issue of whether a "First Amendment concern is presented").[1]

---

[1] Moreover, it is highly questionable whether the newsrack ordinance is indeed content neutral. As the district court observed, requiring stylistic uniformity among all newsracks disproportionately harms alternative newspapers like those published by petitioners—indeed, it renders them "invisible." Pet. App. 50a-51a. Such laws, designed to muffle alternative voices with arbitrary

But that is not the law. As demonstrated by the very criteria employed under both the traditional time, place and manner analysis, see *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983), and the *Central Hudson* test for restrictions on commercial speech, see *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), a speech restriction can be both content neutral and inconsistent with the First Amendment.

2. Respondents also argue that *Coors*, a "mere" commercial speech case, can have no effect on the proper outcome here because, in addition to its commercial speech analysis, the court of appeals also found the newsrack ordinance unobjectionable under the traditional time, place and manner test. This latter test, respondents contend, is in all contexts more stringent than any commercial speech analysis.

This argument is flawed for several reasons. First, and most important, it is an argument that the court of appeals tacitly rejected. The court of appeals based its opinion on the premise that the newsrack ordinance would be unconstitutional if it violated *either* the time, place and manner test *or* the *Central Hudson* analysis for restrictions on commercial speech. See Pet. App. 12a. If the court had believed that the result under the commercial speech analysis followed *a fortiori* from the result under the traditional time, place and manner analysis, it would have said so, and it would not have engaged in a lengthy application of commercial speech principles to the facts of this case. Because the court of appeals attributed a dispositive and independent significance to the commercial speech aspect of this case, it should now have the opportunity to reconsider both its reasoning and

---

demands of stylistic conformity, pose a special threat to the First Amendment's protection of journalistic heterogeneity. *See, e.g., Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 602-03 (1953).

its decision in light of *Coors*, which is squarely inconsistent with the court's existing opinion.

On the merits, respondents cite no authority for the novel proposition that commercial speech analysis is necessarily superfluous where a content-neutral speech restriction would survive mid-tier scrutiny under the traditional time, place and manner criteria. Again, simply by conducting a full scale inquiry under both lines of First Amendment analysis, the court of appeals effectively rejected respondents' position on this issue and foreclosed the very basis on which they now seek to avoid a remand.

Finally, and in any event, the *Coors* decision casts doubt on *both* the court of appeals' commercial speech analysis *and* its traditional time, place and manner analysis. In *Coors*, this Court confirmed that, despite ambiguous prior precedent (see Pet. 9), "the overall irrationality of . . . [a] regulatory scheme" bars any finding under *Central Hudson* that the scheme "directly advances" a legitimate governmental interest. *Coors*, 115 S. Ct. at 1592. From this it follows that the "overall irrationality of a regulatory scheme" can also show, for purposes of the traditional time, place and manner test, that a speech restriction is not "narrowly tailored to serve a significant government interest." *Perry*, 460 U.S. at 46; see generally *Board of Trustees* v. *Fox*, 492 U.S. 469, 477 (1989) (noting " 'substantial[] similar[ity]' " between *Central Hudson* test and time, place and manner analysis). That is particularly true if (as respondents contend) traditional First Amendment analysis necessarily affords more protection than commercial speech analysis. In short, the *Coors* decision challenges the conceptual underpinnings of the decision below, and both the court of appeals and the parties should have an opportunity to address its effect on this case.

3. Respondents seek to distinguish *Coors* on the ground that it, unlike this case, involved a content-discriminatory speech restriction. See Opp. 10. Yet the

issue of content neutrality is not even a component of commercial speech analysis, see *Central Hudson*, 447 U.S. at 566, and it had nothing to do with the *Coors* decision. In *Coors*, this Court struck down a federal alcohol labeling restriction *not* because it was content-based, but because the government's overall inconsistency in pursuing the restriction's ostensible objective "ensures that the labeling ban will fail to achieve" that objective. *Coors*, 115 S. Ct. at 1593. As discussed in our petition (at pp. 8-10), the same kind of pervasive inconsistency undermines Coral Gables' purported justification—the City's widely unenforced Mediterranean "theme"—for its newsrack ordinance.

Respondents seek to distinguish *Coors* on the additional ground that the federal government pursued the regulatory objective at issue in that case (*i.e.*, preventing alcohol-content "strength wars") more inconsistently than Coral Gables has pursued its half-hearted Mediterranean theme in this case. Opp. 10-11.[2] Simply as a factual matter, this claim is untrue. The record confirms, and respondents do not deny, that Coral Gables permits trash

---

[2] Like the court of appeals, *see* Pet. App. 21a, respondents rely on pre-*Coors* decisions of this Court holding that, in certain specific contexts, the state may have legitimate reasons for non-uniform enforcement of the aesthetic objectives it invokes to justify restrictions on commercial speech. *See Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 810-12 (1984) ("[t]he private citizen's interest in controlling the use of his own property" justifies banning certain signs on public property but not on private property); *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 512 (1981) (plurality opinion) (city had "reasonabl[e]" basis for banning "offsite" advertising on city streets but not "onsite" advertising). Here, the City has offered no legitimate reason for permitting innumerable objects on its public streets and sidewalks to clash with its supposed aesthetic theme. More fundamentally, as discussed in our petition (at p. 9), the *Coors* decision sharply limits the *Taxpayers/Metromedia* principle upon which both respondents and the court below have relied—and, indeed, renders it inapplicable here. For that reason alone, the court of appeals should have an opportunity to reconsider its decision in light of *Coors*.

receptacles, awnings, and other objects throughout the City to clash with its supposed aesthetic "theme." Pet. App. 50a. In any event, respondents argue, at bottom, that the *Coors* decision is different in degree, not that it is different in kind. That, of course, is precisely the sort of argument that should be presented to the court of appeals in the first instance, not to this Court as a means of cutting off further consideration of this case in light of intervening precedent.

CONCLUSION

The petition for a writ of certiorari should be granted, the decision below should be vacated, and the case should be remanded to the Eleventh Circuit for further proceedings in light of *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585 (1995).

Respectfully submitted,

SANFORD L. BOHRER
HOLLAND & KNIGHT
701 Brickell Ave.
Miami, FL 33131
(305) 374-8500

DALE COHEN
TRIBUNE COMPANY
435 North Michigan Ave.
Chicago, IL 60611
(312) 222-4123

REX E. LEE *
CARTER G. PHILLIPS
JONATHAN E. NUECHTERLEIN
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioners

September 29, 1995

* Counsel of Record